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JUN 29 2005

DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DIRECTOR
 OF THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

IN THE MATTER OF THE REQUEST FOR)
 ADMINISTRATION IN WATER DISTRICT 120)
 AND THE REQUEST FOR DELIVERY OF WATER)
 TO SENIOR SURFACE WATER RIGHTS BY)
 A&B IRRIGATION DISTRICT,)
 AMERICAN FALLS RESERVOIR DISTRICT #2,)
 BURLEY IRRIGATION DISTRICT,)
 MILNER IRRIGATION DISTRICT,)
 MINIDOKA IRRIGATION DISTRICT,)
 NORTH SIDE CANAL COMPANY, AND)
 TWIN FALLS CANAL COMPANY)
 _____)

**CITY OF POCATELLO'S BRIEF IN RESPONSE TO: 1) THE SURFACE
 WATER COALITION'S PETITION FOR REVIEW OF DIRECTOR'S
 JUNE 3, 2005 ORDER DENYING REQUESTS TO APPOINT AN
 INDEPENDENT HEARING OFFICER AND 2) THE SURFACE WATER
 COALITION'S DISQUALIFICATION OF THE DIRECTOR AS THE
 HEARING OFFICER AS A MATTER OF RIGHT**

SUMMARY

On January 14, 2005, the Surface Water Coalition ("SWC" or "Coalition") hand-delivered a letter to the Director of the Idaho Department of Water Resources ("Director" or "IDWR") requesting administration of junior ground water rights within Water District 120. The Director, on February 14, 2005, declared the matter to be a "contested case". Less than 4 months later, on May 2, 2005, the Director declared the matter an "emergency proceeding" pursuant to Idaho Code § 67-5247 and ordered the curtailment of over 850 wells in the Eastern Snake Plain Aquifer (ESPA) in Water Districts 120 and 130 to answer the SWC's delivery call. Various parties have appealed, including SWC and Pocatello, and a hearing is to be held in this matter in January 2006.

The SWC, apparently dissatisfied with the Director's May 2, 2005 order, has requested, for the third and fourth time, that the Director be replaced as the officer to preside over the hearing. The threshold issue is whether SWC is entitled to have the Director replaced as the presiding officer as a matter of law. In fact, SWC waived its right to request disqualification of the Director without cause under I.C. 67-5252; it cannot show a conflict of interest under Rule 412 of the IDWR Procedural Rules; and its arguments that it is really proceeding under a different statute, I.C. 42-1701A, are similarly without merit. In fact, SWC's attempt to replace the Director as hearing officer would only delay the proceedings to the prejudice of all parties.

BACKGROUND

1. On January 14, 2005, the SWC made its request for administration of junior ground water rights within Water District 120 ("Request for Administration" or "Delivery Call").
2. The first request to replace Director Dreher: On January 20, 2005, the SWC sent a letter to IDWR requesting that the Director "recuse and remove each individual identified [in the letter] from any further involvement in the Department's response to the [Request for Water Right Administration in Water District No. 120 and Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Groundwater Management Area] filings." *Jan. 14th Letter* at 3. The Director was among the persons identified by SWC as subject to recusal or removal.
3. On January 25, 2005, the Director issued an Order responding to the Coalition's January 20th Letter as "a petition for disqualification pursuant to Idaho Code § 67-5252." *Jan. 25th Order* at 1. In response to the SWC's petition for disqualification, the Director:
 - a. ordered the disqualification of "all employees of the department" as "presiding officer[s] in responding to the delivery calls made by the Surface Water Coalition." In addition the Director confirmed that he would "serve as the

presiding officer both for the determinations made in direct response to the delivery calls and for any contested cases that may result." *Jan. 25th Order* at 6.

- b. denied the Coalition's request that he remove and recuse himself as a presiding officer in responding to the delivery call requested by the Coalition. *Id.*
4. On February 14, 2005, in response to the Coalition's request for water right administration in District 120, the Director issued an initial order initiating a contested case pursuant to Idaho Code § 67-5240. *Feb. 14th Order* at 33. That Order also established a deadline for each member of the SWC to provide IDWR with certain factual information regarding the last fifteen irrigation seasons. *Feb. 14th Order* at 34.
5. On April 19, 2005 the Director issued a final order in response to the Coalition's delivery call request. The April 19th Order was amended on May 2, 2005 ("May 2nd Order").
6. The City of Pocatello ("Pocatello") filed a petition to intervene on April 26, 2005. The Director granted Pocatello's Petition on May 11, 2005.
7. The second request to replace Director Dreher: On May 17, 2005, the SWC filed a petition requesting hearing on the Director's May Order and the appointment of an independent hearing officer pursuant to Idaho Code § 42-1701A(2) ("May 17th Petition").
8. On June 3, 2005, the Director denied the Coalition's request for the appointment of an independent hearing officer.
9. The third and fourth requests to replace Director Dreher: On June 17, 2005, the Coalition again renewed its attempts to remove the Director as the Hearing Officer when it filed the two pleadings: "Surface Water Coalition's Petition for Review of Director's June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer" ("Petition for Review") and "Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right" ("Petition for Disqualification").

ARGUMENT

- I. **THE SWC'S REQUESTS FOR DISQUALIFICATION OF THE DIRECTOR AS THE PRESIDING OFFICER ARE NOT SUPPORTED BY THE IDAHO APA, BY TITLE 42 OF THE IDAHO CODE, OR BY THE RULES OF PROCEDURE OF THE IDAHO DEPARTMENT OF WATER RESOURCES.**
 - A. **The Coalition's right to request disqualification of the Director as presiding officer under Idaho Code § 67-5252, if applicable, has been waived.**

Idaho Code § 67-5252 provides in relevant part:

Except as provided in subsection (4) of this section, any party shall have the right to one (1) disqualification without cause of any person serving or designated to serve as presiding officer, and any party shall have a right to move to disqualify for bias, prejudice, interest, substantial prior involvement in the matter other

than as a presiding officer, status as an employee of the agency hearing the contested case, lack of professional knowledge in the subject matter of the contested case, or any other cause provided in this chapter or any cause for which a judge is or may be disqualified.

(2) Any party may petition for the disqualification of a person serving or designated to serve as presiding officer:

(a) **within fourteen (14) days after receipt of notice indicating that the person will preside at the contested case;** or

(b) promptly upon discovering facts establishing grounds for disqualification, whichever is later.

....

(4) Where disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of section 59-704, Idaho Code.

(emphasis added). The Director's February 14th 2005 Order initiated a "contested case" in the above captioned matter¹. Under I.C. 67-5252, the deadline for requests for disqualification as a matter of right, under the statute, begin to toll "within fourteen (14) days after receipt of notice indicating that the person will preside at the contested case". SWC's request is too late.

The Director was correct when he stated in his Order of June 3rd that

No party sought disqualification of the hearing officer under Idaho Code § 67-5252. Any request under Idaho Code § 67-5252 must be raised within fourteen days "after receipt of notice indicating that the person will preside at the contested case." Notice that the Director would preside over the contested case was served on February 14, 2005. Since more than fourteen days have expired since the notice was served that the Director would serve as the hearing officer, any request for disqualification without cause under Idaho Code § 67-5252 has been waived.

¹ The Coalition in its Petition for Disqualification states that the Director "purported to initiate a 'contested case' pursuant to Idaho Code § 67-5240." *Petition for Disqualification* at 3. To answer the question of whether the Coalition's delivery call request initiated a "contested case" takes little more than reviewing the definitions of "contested case" and "order" as provided for at IDWR Procedure Rule 5(07) and (15). A "contested case" is defined as "a proceeding that results in the issuance of an order." An "order" is defined as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." To imply that the delivery call placed by the Coalition would not require the initiation of a contested case seems a little disingenuous. By its very nature the delivery call would require the IDWR to take actions that would determine the legal rights, duties, and privileges of the parties.

June 3rd Order at 2, fn.3. The Coalition's request for disqualification as a matter of right should be denied because it has been waived.

The SWC attempts to avoid its waiver through arguments of semantics, that put form over function. SWC contends that it first received "formal notice" the Director would serve as a hearing officer in a contested case only upon the issuance of the *June 3rd Order*. Regardless of whether SWC received "formal notice", it received actual notice nearly six months ago of the Director's intention to serve as the presiding officer for the hearing. *See, Jan. 25th Order* at 6 (wherein the Director refused to recuse himself and stated that he would "serve as the presiding officer both for the determinations made in direct response to the delivery calls and for any contested cases that may result."); *Feb. 14th Order* at 33 (including the following order provisions: "**The Director** will make a determination of the extent of likely injury.... **The Director** will consider the water delivery call....") (emphasis added).*Id.*

The Coalition next contends, however, that because their "January 20, 2005 letter" did not seek a 'disqualification' of any 'presiding' or 'hearing' officers in a 'contested case'" they have not waived their right to disqualify the Director in this proceeding without cause². *Petition for Disqualification* at 7. The SWC's argument places form over function. However it is characterized, the SWC has been attempting to remove the Director as the presiding officer in this matter since its January 20th Letter was sent to the Department, and since January 25th, 2005, the Director has indicated in official orders of the IDWR that he will be serving as the presiding officer in the hearing in this matter.

B. The Coalition's request that the Director be disqualified as a matter of right under Idaho Code § 67-5252 should be denied because it is untimely.

The Coalition recognizes that the Department's procedural rules do not provide for disqualification of a hearing officer as a matter of right, but contends that "the rules cannot abrogate a party's right provided by statute." *Petition for Disqualification* at 6. Nonetheless, the Coalition waived any disqualification as a matter of right under the APA as discussed above.

² This appears to be an exercise in semantics as the Coalition in their January letter requested the Director to "recuse and remove each individual identified [in the letter] from any further involvement in the Department's response to the [delivery call] filing." *Jan. 14th Letter* at 3. The Director was identified on page 1 of the letter and correctly interpreted this to be a request for his disqualification.

C. Both Idaho Code Section 67-5252 and Procedural Rule 412 require conflict of interest analysis. The Director does not have a conflict of interest.

Based on the authority of I.C. 67-5252(4) and Procedural Rule 412, removal of the Director as hearing officer falls under the provisions of Idaho Code § 59-704. Section 59-704:

In order to determine whether a conflict of interest exists relative to any matter within the scope of the official functions of a public official, a public official may seek legal advice from the attorney representing that governmental entity or from the attorney general or from independent counsel. If the legal advice is that no real or potential conflict of interest exists, the public official may proceed and shall not be subject to the prohibitions of this chapter.

Consistent with this provision, the Director sought the legal advice of Deputy Attorneys General Phil Rassier and Clive Strong regarding his conflict of interest in this matter prior to issuing the Jan. 25th Order. Messrs. Rassier and Strong advised the Director that no real or potential conflict of interest was present in his remaining the presiding officer in the delivery call. *Jan. 25th Order* at 4,5. The Coalition contends, without case law authority, that the legal advice of Deputy Attorneys General Phil Rassier and Clive Strong obtained in January is insufficient in determining whether a conflict of interest exists in the present matter (a hearing on the May 2nd Order). Yet the Director proceeded according to the statutory protocol, and the SWC does not say what else the Director should have done.

D. What is SWC really seeking?

In an interesting twist, after arguing on pages 3-5 of their "Disqualification" request that the Director must be removed and that it did not waive its rights under 67-5252(4), at the bottom of page 5, the SWC changes direction entirely and argues instead that section 67-5252(4) is not applicable. SWC then states that it is only asking that the Director appoint an independent "hearing officer" pursuant to Idaho Code § 42-1701A(2), and that it prefers that the Director remain as a "presiding officer" and only appoint someone else to handle the hearing. *Petition for Disqualification* at 5. Under the SWC's formulation, as "presiding officer" rather than "hearing officer" the Director would retain the ability to affirm or deny the final outcome of the hearing. It is hard to fathom what this will accomplish, other than a delay in the proceedings.

II. THE COALITION'S "PETITION FOR REVIEW OF DIRECTOR'S JUNE 3, 2005 ORDER DENYING REQUESTS TO APPOINT AN INDEPENDENT HEARING OFFICER" SHOULD BE DENIED BECAUSE IT IS NOT SUPPORTED BY FACTS OR LAW

In its May 17th Petition, the SWC asked, *inter alia*, for the appointment of an independent hearing officer under I.C. 42-1701A(2). Its request was based on the following events: 1) that the Director was involved in the development and recalibration of the ESPA ground water model; 2) that the Director supervised department staff in conducting investigations regarding the merits of SWC's delivery call; and 3) that the Director participated, at the direction of the legislature, in negotiation sessions in 2004 regarding the SWC's injury claims.

Under section 42-1701A(2), appointment of an independent hearing officer is at the discretion of the Director. In a June 3, 2005 Order, the Director rejected the SWC's petition, determined that only the Director could offer the relief sought by SWC under its delivery call, and that appointment of a figure-head "hearing officer" would only serve to delay decision in this matter, to the detriment of Idaho's water administration system generally and to the detriment of the water rights that are at issue in this matter.

In its Petition for Review, the SWC states no legal basis for its request, instead it merely renews its assertions that the Director's execution of his obligations and authority to provide for "direction and control of the distribution of water from all natural sources" (I.C. § 42-602) somehow interfere with his ability to objectively consider the evidence as presiding officer in a hearing on the merits of the SWC's delivery call. The statements made in the affidavit of its expert witness, Charles Brockway, Ph.D., P.E., regarding his experiences with the development of the model are inapposite. The Director is responsible for the conjunctive management of water resources within the State of Idaho. The ground water model is a tool utilized in execution of the Director's statutory duties.

The Director has no vested interest in the outcome of the deliver call. He and his staff participated as technical experts in the recalibration of the ESPA ground water model. The development of the model, and the consideration of the merits of SWC's delivery call both require the Director to execute his statutory duties to "direct[] and control the distribution of water from all natural sources..." (I.C. 42-602) and to "control the appropriation and use of the ground water of this state...". I.C. 42-231.

10 P.3d 742, 748 (2000) (“even where a trial judge is exposed to prejudicial information, judges are usually presumed to be ‘capable of disregarding that which should be disregarded’ in our judicial system.”).

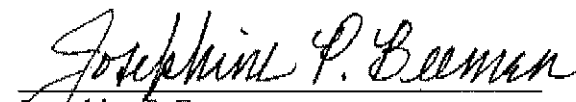
C. As a matter of law, IDWR’s investigatory conversations with various extension agents regarding crop losses is not an adequate ground for disqualification

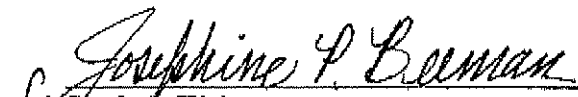
The Coalition argues that conversations had with extension agents regarding crop loss is the various counties supplied by the Coalition are grounds for disqualification. However, it was the Coalition that asked for a determination regarding the injury imposed on its water rights by the pumping of ground water in District 120 and District 130, and then failed to provide the Director with the information he requested in order to make his decision. It is not inappropriate for the Department to make these types of investigation nor is it grounds for disqualification.

The Idaho Department of Water Resources is an administrative agency with regulatory and enforcement authority. This authority “carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.” *See, Dow Chemical Co. v. United States*, 476 U.S. 227, 233 106 S.Ct. 1819, 1824 (1985) (upholding the right of the Environmental Protection Agency to conduct aerial observations in enforcing the Clean Air Act); I.C. § 42-1805, (the duties of the Director are to conduct “investigations, research, examinations ...relating to [the] effective use of existing supply... [and] the distribution and use of water.”). It seems unlikely that the Director’s authority and obligation to conduct investigations and research regarding the most effective use of existing water supplies and their proper distribution could be used as grounds for disqualifying him from the adjudicatory procedures required under Idaho Code Section 42-1701A. *Winthrow*, 421 U.S. at 56, 95 S.Ct. at 1469. (holding that it is common “for members of administrative agencies to receive the results of investigations...and then to participate in the ensuing hearing. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.”).

For the foregoing reasons the Coalition’s Petition for review and Petition for Disqualification should be denied.

Respectfully submitted this 29th day of June 2005.


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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2005, I caused to be served a true and correct copy of the foregoing document by regular U.S. Mail, postage prepaid, to:

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